



POLICE DEPARTMENT

MEMORANDUM FOR: Police Commissioner

December 19, 2012

Re: Police Officer James Gallagher
Tax Registry No. 891541
Midtown North Precinct
Disciplinary Case Nos. 2010-1845 & 2011-4369

Police Officer Timothy Tierney
Tax Registry No. 943876
Midtown North Precinct
Disciplinary Case No. 2011 4368

The above-named members of the Department appeared before me on June 14, 2012, August 20, 2012, and October 25, 2012, charged with the following:

Disciplinary Case No. 2010-1845

1. Said Police Officer James Gallagher, while on duty and assigned to the 18th Precinct, on September 26, 2009, did fail and neglect to render police services in said Officer's assigned area, to wit: after being notified by an individual known to the Department of an allegation of sexual misconduct did fail to request a patrol supervisor respond to the scene.

P.G. 202-21, Page 1, Paragraph 8 POLICE OFFICER DUTIES AND RESPONSIBILITIES

2. Said Police Officer James Gallagher, while on-duty and assigned to the 18th Precinct, on September 26, 2009, did fail to determine if the possibility existed that an offense was motivated by bias, and failed to request the response of a patrol supervisor to the scene.

P.G. 207-10, Page 1, Paragraph 2 & 3 BIAS MOTIVATED INCIDENTS

3. Said Police Officer James Gallagher, while on-duty and assigned to the 18th Precinct, on September 26, 2009, did fail to make relevant and complete entries in his Department issued Activity Log, as required.

P.G. 212-08, Page 1, Paragraph 8 ACTIVITY LOGS

4. Said Police Officer James Gallagher, while on-duty and assigned to the 18th Precinct, on September 26, 2009, did engage in conduct prejudicial to the good order, efficiency and discipline of the Department in that he failed to conduct a proper investigation, to wit: said Police Officer failed to properly identify the complainants involved in a dispute, failed to properly identify the possible perpetrator, failed to canvass for surveillance footage, and failed to canvass for eye witnesses.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED
CONDUCT GENERAL REGULATIONS

5. Said Police Officer James Gallagher, while on-duty and assigned to the 18th Precinct, on September 29, 2009, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer did impede an Official Department investigation in that said Police Officer did fail to give complete and accurate answers to questions asked of him during an Official Department interview.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED
CONDUCT GENERAL REGULATIONS

6. Said Police Officer James Gallagher, while on-duty and assigned to the 18th Precinct, on July 29, 2010, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer did impede an Official Department investigation in that said Police Officer did fail to give complete and accurate answers to questions asked of him during an Official Department interview.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED
CONDUCT GENERAL REGULATIONS

Disciplinary Case No. 2011-4369

1. Said Police Officer James Gallagher, assigned to Midtown Precinct North, on or about March 14, 2011, while on duty, failed to conduct a thorough search for a “special category” missing person, in that said Officer failed to conduct a search of the entire building including the stairwell of the missing person’s residence.

P.G. 207-23, Page 1-4 MISSING PERSONS
P.G. 207-21 Page 1, Paragraph 8 POLICE OFFICER, DUTIES AND
RESPONSIBILITIES

2. Said Police Officer James Gallagher, assigned to Midtown Precinct North, on or about March 14, 2011, while on duty, failed to request a patrol supervisor to respond to the scene of a “special category” missing person.

P.G. 207-23, Page 2, Paragraph 2 MISSING PERSONS

3. Said Police Officer James Gallagher, assigned to Midtown Precinct North, on or about March 14, 2011, while on duty, responded to the scene of a “special category” missing person and failed to notify the desk officer of the details regarding the canvass of the building said Officer conducted.

P.G. 207-23, Page 2, Paragraph 3 – MISSING PERSONS

Disciplinary Case No. 2011 4368

1. Said Police Officer Timothy Tierney, assigned to Midtown Precinct North, on or about March 14, 2011, while on duty, failed to conduct a thorough search for a “special category” missing person, in that said Officer failed to conduct a search of the entire building including the stairwell of the missing person’s residence.

P.G. 207 23, Page 1-4 MISSING PERSONS

P.G. 207-21, Page 1, Paragraph 8 – POLICE OFFICER, DUTIES AND
RESPONSIBILITIES

2. Said Police Officer Timothy Tierney, assigned to Midtown Precinct North, on or about March 14, 2011, while on duty, failed to request a patrol supervisor to respond to the scene of a “special category” missing person.

P.G. 207-23, Page 2, Paragraph 2 MISSING PERSONS

3. Said Police Officer Timothy Tierney, assigned to Midtown Precinct North, on or about March 14, 2011, while on duty, responded to the scene of a “special category” missing person and failed to notify the desk officer of the details regarding the canvass of the building said Officer conducted.

P.G. 207-23, Page 2, Paragraph 3 MISSING PERSONS

The Department was represented by Vivian Joo and Sandra Suweidan, Esqs., Department Advocate’s Office, and Respondents Gallagher and Tierney were represented by Stuart London, Esq.

Respondent Gallagher, through his counsel, pleaded Guilty to Specification Nos. 1 to 4, testified in mitigation of the penalty and Not Guilty to Specifications No. 5 and 6. In Disciplinary Case No. 2011 4369, he entered a plea of Not Guilty. Respondent Tierney, through

his counsel, entered a plea of Not Guilty to Disciplinary Case No. 2011-4368. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case Nos. 2011-4368 and 2011-4369

Respondents are found Not Guilty.

Disciplinary Case No. 2010-1845

Respondent Gallagher having pled guilty is found Guilty of Specification Nos. 1 to 4. Respondent Gallagher is found Not Guilty of Specification Nos. 5 and 6.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

Department called Sergeants Anthony Elor, Christopher Chan and Thomas Tate and Lieutenant Keith King.

Sergeant Anthony Elor

Elor has been with the Department 11 years and has been assigned to the Patrol Borough Manhattan South Investigations Unit for two years. He was assigned a case (involving Respondents' response to) a missing person and a suicide in the confines of the Midtown North Precinct on March 14, 2011. Through his investigation he learned that the matter came to the

Department's attention when Person A and her husband Person B entered the Midtown North Precinct stationhouse at about 0130 hours. They told the Desk Officer, Sergeant Christopher Chan that they had not heard from her mother, Person C in approximately three weeks. Person C, who was 69 years old, lived in the confines [REDACTED].

Chan requested that Respondents Gallagher and Tierney go with the Person A and Person B to try to locate Person C. They went to the building where Person C resided and gained access to the elevator with a key Person A and Person B had in their possession. They checked Person C's apartment [REDACTED] and they checked two additional apartments Person C was known to frequent with negative results. Other than the three apartments, Respondents did not check any other part of the building.

Elor explained that Person C's body was found in the building's stairwell, between the sixth and seventh floors, five or six hours after Respondents had gone to the location. She had died, according to the medical examiner's report, six hours before Person A and Person B went to the precinct.

Elor also reviewed the Temporary Headquarters Log [Department's Exhibit (DX) 1], which he said is utilized to document the results of a missing-person investigation. He stated that the log showed an entry at 0230 hours on the date of the incident. Elor also conducted official Department interviews in the matter. In addition to Respondents, he interviewed Chan and Sergeant Thomas Tate, the Patrol Supervisor. He said that he substantiated the allegations that Respondents had not done a proper search of the building, that they failed to request the response of the patrol supervisor to the scene, and that they failed to notify the desk officer.

Elor stated that "all the accessible areas that [Person C] would have gained access to in the building were to be searched." He said this conclusion was based on his review of the Patrol Guide procedures for missing persons. He said that Person C was a "special category" missing

person due to her age and also, he said, there were circumstances indicating unaccountable and voluntary disappearance.

Elor testified that both Chan and Tate received Command Disciplines and the forfeiture of three days; Chan, for failing to ensure that a proper search was conducted in the absence of the patrol supervisor; and Tate, for failing to conduct a proper search of the building.

On cross-examination, Elor agreed that when Chan sent Respondents on this job, they were not sure if it involved a missing person. He agreed that Chan had said that they had been sent out on a “well being check” which he agreed could be the same as a wellness check. He said that there was no such thing in the Patrol Guide but he agreed that it was not a “special category” missing person case when Respondents had been sent out.

Elor agreed that Person A and Person B had not gone to the apartment before going to the precinct. He stated that there had been a language barrier and that Chan had communicated “the best he could.” Pursuant to the stipulation that at his official Department interview Chan had acknowledged that he had not asked Person A and Person B about Person C’s age, Elor agreed that there could not have been a “special category” missing person search declared when the Respondents went to the building. He agreed that Chan did not even have enough information to make Person C a missing person at that time.

Elor agreed that Chan told Respondents to check three apartments, [REDACTED], and Respondents did so. He agreed that when they left the building they went to check Roosevelt Hospital, which went beyond their instructions. Elor was not aware that when they returned to the precinct Chan had indicated that Tan had a friend in Brooklyn and that they would check with that friend. He was not aware that Respondents had checked to see if Person C had been involved.

in a recent bus accident where many people had lost their lives.¹ Elor said he was aware that Tate was on an elevator job but was unaware that Chan had told them not to contact him because of that. He was not aware that there was no telephone reception where Tate was working.

He agreed that Person C was declared a “special category” missing person after Tate returned to the precinct and that he ordered a Level 1 mobilization from the precinct. He also stated that Tate never went to the building and that he was supposed to have responded there. Elor agreed that doing a search of the building is part of a Level 1 mobilization and that Tate did not do that. He was not aware that Respondents told Tate they would return to the building with him after Tate called a Level 1 mobilization.

Elor testified that Respondents should have known that they had a “special category” missing person case when they got to the building. He agreed that Respondents did not know Person C’s age at that time but argued that Person C’s “involuntary” or “unaccountable” disappearance qualified her to be declared a “special category” missing person. He agreed that he had never interviewed Person A and Person B.

Sergeant Christopher Chan

Chan has been a member of the Department for about nine years and a sergeant for about four years. On March 14, 2011, he was the Midtown North Precinct Desk Officer. At about 0130 hours an Asian couple (Person A and Person B) came into the precinct saying they had not seen a “family member of some sort” (Person C) for about a week, which was not uncommon.

¹ The March 12, 2011, bus crash occurred at the Bronx-Westchester border and resulted in 15 fatalities. The bus was en route to Manhattan’s Chinatown from the Mohegan Sun Resort and Casino in Connecticut.

He could not communicate with the female because of a language barrier but got what information he could from the male. He learned that Person C was friends with two of her neighbors in her building, that she liked to gamble and that she had a friends in Brooklyn. He directed Respondents Gallagher and Tierney to take the couple to the building try to speak to neighbors and check hospitals in the area.

Respondents returned to the precinct and told him they went into Person C's apartment, checked with the two neighbors, and checked the hospital, all with negative results. He testified that they did not report the result of any canvass of the building to him. Chan said he directed Respondents to start filling out missing person paperwork. Chan testified that when Respondents were at the building they should have searched the building, "[s]taircase, roof, whatever they have access to."

Chan testified that Tate, the Patrol Supervisor, who had been handling an earlier job where a man had been crushed in an elevator, returned to the precinct about a minute after Respondents. Chan told Tate about Person C and Tate took over. Chan identified the Temporary Headquarters Log entry at 0230 hours as being in Respondent Gallagher's handwriting. He testified that this entry was made after Respondents returned from the building.

On cross examination, Chan stated that, due to the language barrier, he was unable to ascertain Person C's age and so no "special category" designation given to this case. He agreed that he did not send Respondents out on a missing person case but on a well being of a person case. He agreed that when they went out they were not searching for a "special category" missing person. He acknowledged that he has heard of wellness checks on the Department radio. He agreed

there is no such designation in the Patrol Guide but acknowledged that it is used in practice. He agreed that such a check was not a missing person case.

Chan agreed that Respondents checked three apartments and went to Roosevelt Hospital. He agreed that Person C had a friend in Brooklyn who she sometimes went gambling with and he volunteered that there had been a casino bus accident and they thought that she may have been on that bus. He agreed that Person A and Person B had not said that Person C was gone for three weeks but only for one week, and that it was "common" that they would not hear from her for a week.

Chan agreed that at the time Respondents returned to the precinct they had not committed any misconduct. He recalled that, at that time, Respondents were going to call Tate and that he (Chan) told them not to bother as Tate was on an elevator job and that there was no telephone reception at Tate's location.

He agreed that he told Tate, upon Tate's return to the precinct, that it was possible they had a missing person case. Chan agreed that he found out that Tate had called a Level 1 mobilization.

Sergeant Thomas Tate

Tate has been a member of the Department for almost 22 years and has been a sergeant since 2007. On March 14, 2011, he was the Patrol Supervisor. At about 0300 hours, he walked into the stationhouse and was informed by Chan of a missing 69-year old Asian female (Person C). He spoke with Person C's son-in-law and daughter (Person B and Person A) who were at the precinct and he described them as being "middle age, about 50 [years old]." Although the daughter spoke

broken-English, Tate was able to discern that Person C lived in senior citizen housing and was not answering her phone that day.

Tate did not direct Respondents to do a search of the residence, since he asked Respondent Gallagher if he had done a search and Gallagher had answered in the affirmative. Tate understood this to mean that the entire building had been searched because, "That's what's done in the case of a missing."

Tate said a proper search would have taken 15 or 20 minutes. He had not been previously informed by Respondents to respond to Person C's residence. He said from 0218 to 0243 hours, he had been at a job where a man was trapped under an elevator bank.

After speaking with Person A and Person B, Tate notified the Duty Captain of the "special category" missing person. He was directed to do a five-block grid search, to have Manhattan South Task Force (MSTF) respond, and to activate a Level 1 mobilization. He did not direct MSTF to search the building because Respondents had already done so.

On cross-examination, Tate agreed that he did not go to Person C's residence himself. He agreed that he had been on an elevator job earlier that involved a drunk who had stumbled into the mechanical room behind the elevator. He said his phone worked fine. He did not believe he had used the phone while there. Chan did not notify him about the missing person by phone and no one else called him.

Tate said he returned to the precinct a few minutes after 0300 hours, and was informed that Respondents had been to Person C's residence. When asked if he believed Chan had designated this a "special category" missing person case, Tate answered, "Well, the way he informed me of the job is that he had a missing [REDACTED], so I'm assuming he made it a missing

[person case]. Well, if someone is a 69 years old and we can't locate them, they're a missing person." Tate recalled Chan having told him that there was a missing person, but he could not recall if Chan used the words "special category." He agreed that sometime after 0300 hours he directed Respondents to document the case in the Missing Persons Log.

Tate did not recall Respondent Gallagher volunteering to return to the building after the Level 1 mobilization was activated, nor did Tate recall telling Respondent Gallagher to stay at the precinct and finish the paperwork. Tate stated that he asked Respondent Gallagher if he had searched the building and that Respondent Gallagher had said yes. He agreed that Respondent Gallagher had told him he had searched Person C's apartment and it was possible that Respondent Gallagher told him he had gone to two other apartments. Tate agreed that when he called the Duty Captain, he had assumed that the entire building had been searched.

Tate stated that a search of a building regarding a missing person encompasses the entire building. He explained further: "When I ask you if you searched a building regarding a missing, that means the entire building. I don't need you to search the even floors or just the odd floors. If I ask you to search a building, that means the entire building is swept." When asked about a wellness check he stated:

A wellness check is I don't know what a wellness check is. This is a missing person. You have a 69-year-old person who we can't locate. Whether it's a special category missing or it's a regular missing, if you are going to search the building, you are going to search it from top to bottom each time and every time you deal with a missing person.

On re-direct examination, Tate said that a wellness check does not exist in the Patrol Guide but that it may be used in police jargon.

Lieutenant Keith King

King has been with the Department for over 20 years and is currently assigned to the 111 Precinct. While at his previous command, Internal Affairs Bureau Group 10, he was assigned to investigate allegations that Respondent Gallagher failed to take a police report, failed to take police action, failed to notify a supervisor and impeded an investigation of an incident that occurred on September 26, 2009.

He said the three complainants in that case, Person D, Person E and Person F, stated that they were walking down the street when a person later identified as Person G flicked a cigarette and struck one of the complainants. A verbal altercation ensued in which Person G made some derogatory statements, including some anti-gay statements and it escalated into a physical altercation. One of the complainants was pushed onto a car by Person G (causing damage to the hood) and another was hit and sustained a cut to the lip. Person G was later identified as a member of the military.

King said that Respondent had two official Department interviews. King did not conduct the first interview on September 28, 2009 (DX 2A, tape recording, and DX 2B, transcript), but he did conduct the second interview on July 9, 2010 (DX 3A, tape recording, and DX 3B, transcript). Prior to conducting the second interview, King reviewed Respondent Gallagher's first interview, as well as statements made by Person G. King, in the second interview, focused on Respondent Gallagher's earlier assertions that he had responded as a backup unit, that he did not see any damage to the hood of the car, that he was not aware of Person G showing any identification to any officer, or that any anti gay comments were made in the officers' presence (DX 4, chart prepared by the Assistant Department Advocate listing instances in both official Department

interviews where Respondent Gallagher denied knowledge of damage to the car, denied being informed that the incident involved anti-gay remarks and denied knowledge that the perpetrator was in the military).

King explained that he Respondent was asked about the damage to the vehicle because “an independent witness,” “Person H”² he said stated that he observed the damage to the vehicle. He went on:

Also, one of the complainants, Person E, who later identified [Respondent] in a photo array, stated that he had informed [Respondent] of the damage to the vehicle and the officer stated something to the effect that it had Jersey plates and there was nothing we could do. Something to that effect.³

King stated that at the official Department interviews of other police officers involved in the incident, two, Anthony Manto and Higgins had acknowledged seeing a dent in the vehicle. Manto saw a dent in the front quarter panel of the vehicle, while Higgins said the car had a damaged hood that was consistent with someone having been thrown on the vehicle. Higgins also acknowledging hearing someone being interviewed who mentioned he had come back from a tour, which he interpreted to mean that the person had a military background.

King said that Person G had who claimed during his interview that he told officers on the scene that he had been falsely accused of making anti-gay remarks by the complainants and that he (Person G) informed the officers that he overheard the complainants attribute the remarks to him. King also said that there were six officers on the scene and Person G did not identify the officers he spoke to.

²

In Court Exhibit (CX) 1, (Investigating Officer’s Report dated September 28, 2009), admitted into evidence later in his testimony, Person F stated that one of the “people he was with” was “Person H” and provided his phone number.

³ The person King was referring to apparently was not Person E but Person F, see CX 1 referenced above.

King also stated that Person H heard Person G yelling, "I hope you get AIDS and die" and "[Y]ou are a bunch of faggots," in the presence of the officers.

King did not interview Person G but based on reading the transcript, he said that Person G acknowledged showing his identification to an officer. King further testified that there was surveillance video of Person G showing what appeared to be identification to Officer William Walsh.

On cross-examination, King agreed that the surveillance video shows Person G taking something out of his wallet, showing it, then putting it back in his wallet but it can not be discerned from the video what was shown. This took place in a matter of seconds. King also agreed that although Walsh is seen in the video, Respondent Gallagher is not and King had no idea where Respondent Gallagher was at that point in time. King said that during his official Department interview, Respondent Gallagher had told him that he was five to ten feet from where Person G was interacting with an officer and never saw anything being presented.

King agreed that Person G adamantly denied making anti-gay comments and that Person G never identified Respondent Gallagher as an officer he spoke to. He also agreed that the person who said he heard Person G make comments about "faggots" never identified Respondent Gallagher as being present when that comment was made. King agreed that he did not have any independent evidence that Respondent Gallagher was on the scene when those comments were made.

He agreed that Respondent Gallagher denied having any conversation with Person G and that nothing on the video and nothing Person G said contradicted that. He agreed that it was Officer Gerard Howard who initially approached the three complainants. Walsh also initially approached the three and then walked over to Person G. He agreed that Howard got into a verbal confrontation with the three complainants because they wanted to file an assault complaint and

they were not happy that Howard told them that based on what they had told him it was only harassment. It sounded "somewhat accurate" to King that one of the complainants approached Respondent Gallagher about filing an assault complaint and Respondent Gallagher told him that he concurred with Howard's determination of harassment. King agreed that Respondent Gallagher acknowledged overhearing that conversation and seeing Howard use a flashlight to look into a complainant's mouth. He agreed that Respondent Gallagher stated at his official Department interview that he cancelled the ambulance because there was no injury. King conceded that he had no direct knowledge that Respondent Gallagher was aware that Person G was in the military.

King believed the vehicle in question was a Honda Accord and he did not know where it was parked in relation to where the officers were or whose vehicle it was. He believed the damage was on the hood of the vehicle, although he never saw the damage nor did anyone take a photo of it. Based on the complainants' account of the incident and Manto and Higgins' statements, King did not believe the damage was old as one of the officers stated that the damage seemed consistent with someone being pushed or shoved onto the car. He did not recall if any witness was asked if it could have been old damage. No one indicated to King where Respondent Gallagher was when that damage was discussed. King conceded that he had no direct evidence that Respondent Gallagher observed the damage.

On re-direct examination, King stated that Person G acknowledged speaking with officers on the scene but Person G did not specify with whom. Person G accused one of the complainants with "trying to grab his junk or something to that effect," and Person G acknowledged some kind of dispute between himself and the complainants. Person G claimed that he overheard the

complainants, when they were talking to the officers, accuse him of making derogatory remarks and Person G denied doing this when he spoke to the officers.

King also testified that Person F stated that he brought the damage to the car to the officers' attention and was told that nothing could be done because the owner was not present. When he suggested checking the license plate, he was told that since it had New Jersey plates it was not their problem. King claimed that the Investigating Officer's Report summarizing Person F's interview [Court's Exhibit (CX) 1] indicated that Respondent Gallagher was the person with whom Person F spoke, based on Person F identifying Respondent Gallagher in a photo array.

On re-cross examination, King said that he did not know if Person F said that Respondent was the person who declined to take the assault complaint and noted that he did not interview Person F. King stated that the Investigating Officer's Report did not state the exact context of the conversation.

When asked by the Court if the Investigating Officer's Report indicated that Respondent was the person Person F spoke to about the damage, King stated:

He [Person F] did. Well no, he reported that he brought the damage to the police's attention, it doesn't state who, and was informed nothing could be done because the owner was not present...So I can't state with certainty.

King concluded that the worksheet only established that Respondent Gallagher was an officer Person F spoke to but it does not show what they talked about. He noted that Person F only identified one officer, respondent Gallagher. King agreed that he was "reading the worksheet [Investigating Officer's Report]" and had not interviewed Person F himself.

Respondents' Case

Respondents testified in their own behalf.

Respondent Tierney

Respondent Tierney and Respondent Gallagher were together throughout almost the entirety of the events in the disciplinary cases arising from the events of March 14, 2011. As a result, the substance of their testimonies is virtually identical. There is, thus, no need to summarize Respondent Tierney's testimony as the substance will be found in the summary of Respondent Gallagher's testimony.

Respondent Gallagher

Respondent Gallagher has been with the Department for over 25 years. He is currently assigned to the Midtown North Precinct where he has been assigned for 17 years. On March 14, 2011, he was working with Respondent Tierney when they were called to the stationhouse by Chan. When they got there they were told by Chan to take a male and female who were seated in the stationhouse (Person A and Person B) on a wellness check of one of their relatives.

Respondent Gallagher explained that on a wellness check they go to a location where someone is not feeling well or is sick or "something like that." He said that such a run is not unusual. He did not speak to Person A and Person B, however, Chan told them that the male had keys to the apartment and they were going to check on someone named "Person C," who was the mother-in-law of the male and the mother of the female. They did not tell him Person C's age.

They went with the Person A and Person B to Person C's residence at an assisted-living facility for people over 55 years of age. At that time, he was doing a wellness check and not looking for a missing person. At the building, he spoke to the security person who had just come on duty and had not seen Person C. She called the security person who had previously been on duty who said that Person C was last seen at about 1300 hours. They went into Person C's apartment █ and no one was there. They went to apartments █ because Chan had told them those neighbors were Person C's friends but no one answered either door.

Respondent Gallagher testified that Chan told them to come back after going to those apartments because Person C had a friend who she might be with in Brooklyn. However, as Person C's building was near Roosevelt Hospital, they checked there as well, since she had been seen going at 1300 hours, and they surmised she may have been hurt. Person C was not at Roosevelt Hospital.

When they got back to the precinct, Respondent Gallagher called Patrol Borough Bronx to check the list of victims of a bus accident with people who had gone to a casino, as Person C fit the description of someone who might have been on the bus. She was not. At that point, after again speaking with Person A and Person B, Chan decided to declare Person C a "special category" missing person.

Respondent Gallagher did not know where Tate was and when he was going to notify Tate on the radio, Chan told him not to because Tate was dealing with a man wedged between an elevator wall and car, and would not receive the transmission. He and Respondent Tierney went to the 124 Room to start the "special category" missing person paperwork and he opened up the Temporary Headquarters Log and began making notifications.

A short time later, Tate came in and, after speaking with Chan, said he was going to Person C's building. Respondent Gallagher did not have a conversation with Tate, believing that Chan had

informed Tate of what had happened. Respondent Gallagher said that he told Tate that he was going to go back to the building to complete the search but Tate told him to stay and continue doing the paperwork. Tate was going to call a Level 1 mobilization and MSTF was going to do the search. Respondent Gallagher explained that a Level 1 mobilization activates the response of the borough task force, who would be at the disposal of the patrol supervisor to do building searches or grid searches or “whatever he wants.” At that time, he did not know if Tate went to the building to do a search of the building, and to his knowledge, no one did.

About the time he finished the paperwork Chan told him that the Level 1 mobilization had been completed with negative results. He denied that Tate ever asked if he had done a search of the building and he claimed to have told Tate that he had wanted to complete his search. Neither Tate nor Chan ever indicated to him whether the building was searched. The following day he learned that Person C had been found dead in the stairwell.

Respondent Gallagher said the first time he became aware of Person C’s age was when they got back to the stationhouse after checking the three apartments and the hospital. He asserted that at the time he went to the building no one had classified the job a “special category” missing person as defined in the Patrol Guide.

On September 26, 2009, Respondent worked with Walsh and they responded to a radio run of an assault in progress at a bar on Ninth Avenue. They arrived at the location at the same time as Howard and Manto. Walsh walked up to the bar where Manto had started a conversation with one male (Person G). Respondent Gallagher said that he remained in the street near the curb next to Howard. Respondent Gallagher said that he could see and hear a conversation that Howard had with three individuals (the complainants) who said that they were walking south on

Ninth Avenue when they became involved in a verbal dispute with a male standing near the bar entrance and one person had been pushed. He did not see any damage to a vehicle and no damage had been brought to his attention. He did not hear any anti-gay statements made in his presence.

After the complainants explained or tried to explain what had happened, Howard advised them that this was not an assault and that it was a violation of harassment. When Howard mentioned the word "harassment," the complainants became enraged and were adamant that they wanted Person G arrested for assault. Respondent Gallagher said it was obvious by their slurred speech and "extremely loud" and "very combative behavior" that the three complainants had been drinking.

Respondent Gallagher said one of the complainants spoke to him directly and he explained that the action did not rise to the level of assault. He did not hear the conversation Manto and Walsh had with Person G. He did not see him show identification nor did he hear him discuss getting back from a tour. He said he did not call for a patrol supervisor and that he was on the scene for about 20 minutes. The job was closed as a non-crime corrected.

He did not see the complainants again but understood that they came to the precinct. He did make entries in his memo book; when they received the job, what type of job it was and when it was finalized. He did not make further entries. He did not canvass the neighborhood for surveillance video or eyewitnesses. He did not identify the perpetrator or write down his pedigree information, or have a conversation with him.

On cross-examination, Respondent Gallagher agreed he had to be one of the senior officers in the command and he is familiar with the Patrol Guide rules on missing persons. He

agreed that he knew one of the missing person categories is when someone is unaccounted for and another is when someone is over the age of 65. He agreed he knew he was going to a residence for senior citizens. It took about two minutes to get to the residence from the stationhouse. He did not have any conversations with Person A and Person B and he was driving the patrol car. He agreed that a "10-56" radio code means an officer is to verify if an ambulance is needed. He was doing a wellness check on Person C though there was no indication she was sick. He agreed when he got to the residence he learned that the woman had been seen about 12 hours before. He also agreed she was not in the apartment or the neighbors' apartments in the building. He said he did not call Chan because Chan had said to come back to the precinct and report what he found. He agreed he did not call Tate either.

He said that at that point, Person C was not yet deemed a missing person. As far as he knew, there was still a location in Brooklyn that had to be checked and there was still a friend in Brooklyn with whom Person C liked to go to the casinos. He said they never checked the friend in Brooklyn because when they returned to the precinct Chan learned Person C's age and called a "special category" missing person operation.

Respondent Gallagher denied telling Detective Murphy of Night Watch or Tate that he had done an entire canvass of the building. He agreed that he wrote the entry in the Temporary Headquarters Log and it did not contain anything regarding a wellness check.

On September 26, 2009, Respondent Gallagher responded to an assault in progress in his patrol car with Walsh while Manto and Howard responded in another car almost simultaneous to them. He also agreed that, shortly after, Officers Higgins and Montevani also arrived on the scene.

Respondent Gallagher said that Walsh was standing next to him originally and might have said something to the three complainants before Walsh walked over to the building line. He did not remember what role Higgins and Montevani played. Manto might have spoken to one of the complainants and asked if he needed an ambulance. He said Manto was there for a few seconds but most of the time he was by the building. He definitely heard Howard ask if the complainant if he wanted an ambulance. Also he agreed that Howard was the one who was trying to explain that it was not an assault. He also spoke to one of the complainants who was upset. He agreed that they were loud and combative. He denied hearing anti-gay remarks. He agreed that one of the complainants told Howard that they had been walking on the street when Person G came out of a bar, flicked a cigarette at them and that that was what started the situation.

Respondent Gallagher agreed he did not follow up with questions but said this was because he was the backup officer to Sector Frank, Howard and Manto. It was their assignment and he was "there in case something goes wrong."

He did not remember Higgins going up to Person G. He knew Higgins was there but did not know what his role was. He neither saw Person G take out identification nor did he ask Person G for any. He did not identify the three complainants either. He said he never saw the damage to the vehicle and it was never brought to his attention by any of the complainants. He stated that he never said that because the car was from New Jersey, it was not his problem.

Upon questioning by the Court as to why Respondent Gallagher had pled guilty to Specification No. 1 in Disciplinary Case No. 2010-1845, which charges that "after being notified by an individual known to the Department of an allegation of sexual misconduct [Respondent Gallagher] did fail to request a patrol supervisor respond to the scene," Respondent Gallagher

answered that he had done so on advice of counsel. He reiterated that he never requested a sergeant to respond and denied that he had any knowledge of any anti-gay statements.

Respondent Gallagher, through his counsel then agreed that Respondent Gallagher had pled guilty to Specification No. 1 because he acknowledged hearing Person G claim that one of the men had touched his genitals and therefore was guilty of Specification No. 1. It was also agreed that he had pled guilty to Specification No. 2 because he was guilty of that specification given the way it was worded.

FINDINGS AND ANALYSIS

Disciplinary Case No. 2011-4369 and Disciplinary Case No. 2011-4368 are identical sets of charges, the first relates to Respondent Gallagher and the second to Respondent Tierney.

What this case involves can best and most effectively be described as a blunder. A couple, Person A and Person B, walked into the precinct and spoke to the Desk Officer, Chan. There was something of a language barrier with at least one of Person A and Person B. They told Chan they had not been in touch with the woman's mother, Person C, for over one week. They also indicated, according to Chan, that this was not unusual so one has to wonder why they came to the stationhouse in first place.⁴

Chan assigned Respondents to do what he and they described as a "wellness check." They went to the location where Person C lived and, with a key Person A and Person B had, they entered her apartment. They then went to the apartments of two of her friends but no one answered the door.

⁴ It is worth noting that Elor who substantiated the charges but was not a direct witness to any of the events of March 14, 2011, testified that Chan had been told Person C had been missing for three weeks. He did not mention anything about Chan saying that they told him this was not unusual.

at either apartment. They spoke to the security person in the lobby. They went to a local hospital. They had no success in locating Person C. They had learned that Person C liked to gamble with a friend she had in Brooklyn and as a result they checked to see if she had been on a bus that had crashed recently with numerous victims.

They say they wanted to call the Patrol Supervisor, Tate, but were told by Chan not to bother as he was dealing with a very serious elevator incident and could not be reached by cell phone. When Tate returned to the precinct, he called a Level 1 mobilization for a "special category" missing person. The "special category" designation was added as, by the time this was done, they had learned that Person C was over 65 years of age.

The mobilization was carried out as it should have been except for one thing. Tate did not order a "vertical" search of the building where the woman lived because he believed, incorrectly, that Respondents had done this when they had been in the building.

Several hours later, Person C was found hanging in the stairwell on a floor above the level of her apartment. She had committed suicide approximately five hours before Person A and Person B had walked into the police station in the first place.

The two sergeants, Chan and Tate, both accepted Command Disciplines for their role in this blunder and each forfeited three days.

Specification No. 1 in each case alleges that the officer "failed to conduct a thorough search for a 'special category' missing person, in that said Officer failed to conduct a search of the entire building including the stairwell of the missing person's residence." Specification No. 2 alleges that Respondents failed to request a patrol supervisor to respond to the scene of a 'special category' missing person and Specification No. 3 alleges that the officers "responded to

the scene of a ‘special category’ missing person and failed to notify the desk officer of the details regarding the canvass of the building said Officer conducted.”

As can be seen, each of these specifications is premised on the belief that Respondents were sent out on a “special category” missing person search. The problem with this was that at the time they were sent out there was no missing person search. While the term “wellness check” is something outside of the Patrol Guide it is clearly not a missing person search. It was by whatever name a kind of preliminary examination of the situation. The testimony presented by the Department establishes that the “special category” missing person search was declared after Respondents returned to the stationhouse.

Certainly, Respondents did what they were told to do in regard to the “wellness check.” They gained access to the apartment. They interviewed the building security person. They attempted to check the apartments of two friends. They even went beyond by going to the hospital to see if Person C was there⁵ and calling to see if she was a victim of the casino bus accident.

Given that level of concern, it is not clear why they did not do a vertical search of the stairway. Police work often requires initiative and here Respondents’ did not take full initiative, however that is not what is charged. What is charged is that they failed to do a vertical search during a “special category” missing person operation. Doing a vertical search is very much a part of such an operation. The problem with the charges lodged by the Department is that evidence is very clear that the special category missing person operation was not called until

⁵ Chan testified that he had told them to check the hospital when they went out. Respondent Gallagher testified that he checked the hospital because Person C had been seen about 12 hours earlier and the hospital was nearby. He said that he initiated the check of the hospital because something could have happened to her when she went out. Respondent Gallagher’s version of why he went to Roosevelt Hospital makes more sense and I credit it.

after Respondents returned to the stationhouse after having been to the residence and the hospital.

Tate said he called for the “special category” missing person operation after 0300 hours. The Temporary Headquarters Log indicates the operation commenced at 0230 hours. Indeed, the entry was made by Respondent Gallagher and according to Chan and Respondent Gallagher it was made at his direction when he learned for the first time that Person C was 69 years old.

Whatever the exact and correct time a “special category” missing person search was commenced, the evidence is unambiguous it occurred after Respondents returned from their visit to the residence. Thus, at the time they were at that building there was no such operation in place and they were not required to do a vertical search.

As I said at the outset this matter was a blunder. When Tate came back to the precinct he spoke to Respondent Gallagher. He believed that Respondent Gallagher had told him that he had searched the residence which would, in the case of a “special category” missing person, include a vertical search of the stairway. Clearly, there was some kind of unintended miscommunication. Examining the testimony it would appear that Tate assumed that Respondent had gone out on a missing person operation. Respondent Gallagher said he offered to go back to the building but was told that he and Respondent Tierney should remain at the stationhouse and do paperwork. In the meantime, Tate told the units responding to the operation that it was unnecessary to conduct a search of the building as it had already been done.

Because Respondents were not at the residence conducting a “special category” missing person operation they must be found Not Guilty of Specification No. 1. Specification No. 2 also

charges Respondents with failing to call for a patrol supervisor to respond to the scene of a “special category” missing person. Again that was not the case.

There is nothing that occurred at the building that would indicate that calling for a patrol supervisor was required. Indeed the need to have called for a patrol supervisor seems to have been manufactured after the fact. For instance, the Department attempted to elicit testimony that would indicate that Respondent would had to have known that the missing woman was over 65 years of age. The Assistant Department Advocate asked Tate how old he thought Person A and Person B were and he said they appeared to be in their 50s. Respondent Tierney testified that they appeared to be in their 30s. There is no further evidence to establish their age. However, Chan also spoke to them and he said he did not learn Person C’s age until they all returned to the precinct after having gone to her apartment and the hospital. There is, thus, no reason why Respondents should be held responsible for not knowing Person C’s age, certainly no more responsible than Chan.

Similarly, the Department offered evidence that the residence was for older persons. But that included people 55 years of age and older, hardly proof that Respondents knew Person C was over 65 years of age.

Chan was present when Respondents returned to the precinct. He did not criticize them for failing to call for a patrol supervisor, in fact, he told them that Tate could not be reached. Chan did not call the duty captain. Instead, when he learned Person C’s age, he told Respondents to start preparing paperwork for a “special category” missing person presumably so that it would be ready when Tate returned.

The Department provided no evidence that there was a need to call a patrol supervisor while Respondents were in the building. Consequently, both because they were not on a “special

category” missing person search and because no specific reason has been presented as to why they had to notify the patrol supervisor Respondents are found Not Guilty of Specification No. 2. Specification No. 3 as noted also incorrectly charges Respondents with being on a “special category” missing person search. But the specific alleged failure is vague. The charge is that Respondents failed to report the “details” about the canvass they conducted to the desk officer.

Here again the lack of care in which the charges were drafted is apparent. There is no evidence that they failed to provide any information to Chan. The miscommunication was with the Patrol Supervisor, Tate. Examining Tate’s testimony, it would appear that based on information he had at the time of return to the precinct he believed that Respondents had been sent out initially on a “special category” missing person case. He assumed that Respondents had done a full search of the building as would be required in a “special category” missing person operation. All of this indicates that the charges were drafted with great hindsight; that is, with the intent on holding Respondents responsible for the aforementioned blunder regardless of the facts.

Because Respondents were not on a “special category” missing person search and because there is no evidence that they failed to provided any information to the desk officer, Respondents are found Not Guilty of Specification No. 3.

The charges in Disciplinary Case No. 2010 1845 involve only Respondent Gallagher and arise out of incident that occurred outside a bar in Manhattan in the early morning hours of

September 26, 2009. While that entire incident was not litigated in this proceeding some facts about what occurred did emerge.

The incident involved a radio run of an assault. Respondent Gallagher was the operator of one of the patrol cars responding to that radio run. In all, three cars with six officers responded.

Three men alleged that they had been assaulted by another man, Person G, who was a sergeant in the military. They wanted Person G charged with assault. One of the other responding officers told them that there was no physical injury and hence assault could not be charged. They also claim that they told the officers that they had explained that Person G had made anti-gay remarks during the assault. There is evidence, including video surveillance, which indicates that Person G showed his identification to an officer on the scene. There also indication that Person G told officers on the scene that he knew that the three men were accusing him of making anti-gay remarks and that he denied making such remarks. He also claimed that one of the men touched his body in the area of his genitalia. There is also evidence that during the incident one of the three men was pushed onto the hood of a car causing damage to the car.

Respondent Gallagher has pled guilty to several specifications in this case but he adamantly denies that he knew about the alleged anti-gay remarks, about the damage to the car and the fact that Person G was a member of the military. These denials by Respondent Gallagher are at the heart of Specification Nos. 5 and 6.

Specification No. 5 charges Respondent Gallagher with impeding an investigation by lying about these things at an official Department interview on September 29, 2009. Specification No. 6 again charges Respondent Gallagher with impeding an investigation by lying

about these things at another official Department interview on July 29, 2010.⁶ It should be noted that Respondent Gallagher said in essence these same things at his testimony, under oath, at this proceeding.

To establish that Respondent Gallagher impeded an investigation in this case the Department must establish that Respondent Gallagher lied about one or more of these three matters. The evidence put forward to prove that Respondent Gallagher lied is devoid of substance.

The Department did not produce a single witness to the incident of September 16, 2009. It did not produce a recorded interview of an eyewitness, a photograph, a video or any direct evidence of the events of that date. It did not even produce direct hearsay on this issue - that is, it did not produce someone who directly spoke to a witness to the incident. What the Department did produce was King who testified to what he read in a report prepared by another person or persons. Indeed, as the report was the best evidence we had available at trial I had at least a part of that report in the form of an Investigating Officer's Report placed in evidence (CX 1).

No evidence was presented that Respondent Gallagher knew that Person G was a member of the military. King did testify that video established that it appeared that Person G showed his identification to another officer and not to this Respondent. So there is no way of establishing that the officer knew about Person G's status.

⁶ The actual language of the specifications is vague. The specifications allege that Respondent "did impede an Official Department investigation in that said Police Officer did fail to give complete and accurate answers to questions asked of him during an Official Department interview." At the trial the Department made clear that these three topics were the specific alleged lies.

The only evidence that links Respondent Gallagher to the issue of the damaged vehicle is the aforementioned report, which provides conflicting information about Respondent Gallagher's potential knowledge of the damage to the vehicle. For instance, the report notes that the person interviewed, Person F, identified Respondent Gallagher from a photo array and linked him to the statement that nothing could be done about the car because it had New Jersey license plates. But four paragraphs earlier in the report, Person F also said that he believed the name of the officer who made that comment about the car was an officer named "Shaw." Additionally, Person F was shown seven other photo arrays with negative results.

Thus, all the Department has provided on this issue is uncorroborated hearsay evidence about an uncertain identification.

It is certainly understandable that civilian witnesses are unwilling to come into the trial room, however three other officers who were on the scene have previously pled guilty to similar charges. Their presence in the trial room could easily have been compelled by the Department.⁷ Ordinarily, when a party fails to call a witness whom that party would be expected to call, the finder of fact can draw an inference that such testimony would not support that party on the issue or issues in question (see Richardson on Evidence section 3-140).

It is unnecessary to draw that inference to come to the conclusion that the Department has failed to provide competent evidence that Respondent Gallagher was less than truthful about any of the three issues it claims he lied about. Additionally, even the Department's uncorroborated multi-level hearsay evidence has failed to meet its burden of proof to establish that Respondent

⁷ Some evidence was offered regarding the fact that two of the officers, Manto and Higgins, saw the damage to the car and that Higgins had heard Person G say something about coming back from a tour. There was no evidence that either of these officers said that Respondent was with him when they made the observation of the car or heard King make that statement. Nor did the Department offer any hearsay from the other officers to indicate that Respondent had verbally acknowledged knowing about any of the three things he claimed not to know about.

Gallagher lied about any of these three issues. Respondent Gallagher must be found Not Guilty of Specification Nos. 5 and 6.

PENALTY

In order to determine an appropriate penalty, Respondent Gallagher's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent Gallagher was appointed to the Department on January 20, 1987. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found guilty of four specifications to which he has pled guilty in Disciplinary Case No. 2010-1845. It should be noted that at the conclusion of his testimony I asked Respondent why he had pled guilty to one of the specifications in that he denied knowing that the three alleged victims claimed that they were the victims of a bias incident. Respondent answered that he had entered the plea on advice of his attorney. When a conference was held with his attorney the language of Specification No. 2 was brought to the attention of the Court. The operative language is as follows: “[Respondent] did fail to determine if the possibility existed that an offense was motivated by bias, and failed to request the response of a patrol supervisor to the scene,” (emphasis added). This language is so broad that it could apply to any officer responding to any incident. As such, the plea to this charge is not inconsistent with Respondent’s testimony that he did not know of the bias allegation. The language of this specification is also so broad that it cannot be the basis for a penalty.

During that conference the attorney also represented that Respondent Gallagher had pled guilty to Specification No. 1 because he had heard Person G claim that one of the three men had touched his "junk" referring to his genitalia and that that is why Respondent Gallagher had pled guilty to that specification which specifically mentions a bias allegation and Person G's allegation was what he was referring to in that plea. Respondent Gallagher, who was no longer on the witness stand, agreed.

A review of Respondent Gallagher's testimony during this proceeding indicates that the issue was not addressed in his testimony here. A review of his first official Department interview (DX 2B) was also conducted by this Court in preparing this report. Respondent Gallagher was specifically asked about the "junk" comment and specifically denied hearing it.

This, of course, is rather troubling as Respondent Gallagher's knowledge about allegations made during the incident are at the heart of the two contested specifications in this case. This Court sees no reason to change its findings on those two specifications because, as has been noted, they were not proven. Further, as Respondent Gallagher asserted that he wished the Court to accept his plea to Specification No. 1 it can do so because that specification also alleges that Respondent Gallagher failed to call for a patrol supervisor. His testimony and statements regarding this incident indicate that he was on the scene for about 20 minutes and that the complainants were insistent that an assault complaint be taken. There was ample reason for Respondent Gallagher, a senior patrol officer, to have called for a patrol supervisor.

Specification No. 3 involves the failure to make relevant and complete entries in his Activity Log. This certainly merits consideration on the issue of penalty but unlike in many

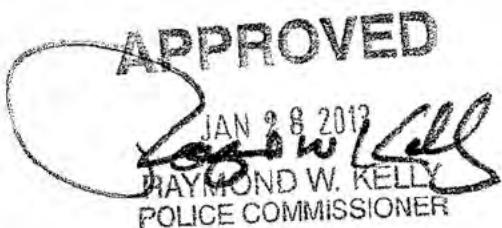
cases where no entry at all is made, here Respondent did make some entries regarding the incident.

In assessing a penalty, Specification Nos. 1 and 4 are quite significant. The Department has argued that this Respondent and the officers on the scene ignored a bias incident and wrote the incident off without taking any action against the alleged perpetrator who was a member of the military as some kind of favor or courtesy.

No one is charged with that type of cover up, however the actions of all the officers left that impression. Under the circumstances the failure to call for a patrol supervisor (Specification No. 1) is a significant failure. Similarly the failure to conduct a more thorough investigation at the scene particularly given how long they were there (Specification No. 4) is also a significant failure.

Given Respondent's long and hitherto unblemished service record the recommended penalty is the loss of 25 vacation days.

Respectfully submitted,




Martin G. Karopkin
Deputy Commissioner – Trials

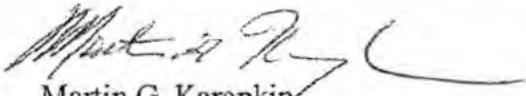
POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER JAMES GALLAGHER
TAX REGISTRY NO. 891541
DISCIPLINARY CASE NOS. 2010-1845 & 2011-4369

Respondent received an overall rating of 4.0 "Highly Competent" on his last three annual performance evaluations. He has been awarded 13 medals for Excellent Police Duty and five for Meritorious Police Duty. [REDACTED]

[REDACTED] Respondent has no prior formal disciplinary record.

For your consideration.



Martin G. Karopkin
Deputy Commissioner – Trials